Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BRICKLAYERS AND ALLIED CRAFTWORKERS LOCAL 1, and MARK KING,

Petitioners,

v.

J & J CONSTRUCTION COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Michigan

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PETITION FOR A WRIT OF CERTIORARI

MARY ELLEN GUREWITZ
1000 Farmer Street
Detroit, MI 48226

JAMES B. COPPESS
815 Sixteenth Street, NW
Washington, DC 20006

LAURENCE GOLD *
805 Fifteenth Street, NW
Washington, DC 20005
(202) 842-2600

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether, under the First Amendment's Petition Clause, statements addressed to government representatives critical of a third party's performance of a public function or fitness to perform a public function are entitled to the protection of the "actual malice" standard of *New Times Co. v. Sullivan*, 376 U.S. 254 (1964), against defamation claims brought by the third party.

PARTIES TO THE PROCEEDING

The caption of the case includes all parties to the proceeding in the courts below.

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PETITION FOR A WRIT OF CERTIORARI

Bricklayers and Allied Craftworkers Local 1 and Mark King petition for a writ of certiorari to review the judgment of the Michigan Supreme Court in *J & J Construction v. Bricklayers Local 1*, Mich. Sup. Ct. No. 119357.

OPINIONS BELOW

The opinion of the Michigan Supreme Court is reported at 468 Mich. 722, 664 N.W.2d 728 and is attached as Appendix A, pp. 1a-36a. The opinion of the Michigan Court of Appeals is reported at 245 Mich. App. 722, 631 N.W.2d 42 and is attached as Appendix B, pp. 37a-55a. The decision and judgment of the Wayne County Circuit Court are unreported and are attached as Appendix C, pp. 56a-77a. The order of the Michigan Supreme Court denying rehearing is reported at 668 N.W.2d 910 and is attached as Appendix D, p. 78a.

JURISDICTION

The judgment of the Michigan Supreme Court was entered on July 9, 2003. A timely petition for rehearing was denied on September 15, 2003. The jurisdiction of this Court in invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

1. Respondent, J & J Construction Company, brought this defamation suit against Petitioners, Bricklayers and Allied Craftworkers Local 1 and Local 1's business agent Mark King, alleging, *inter alia*, that King made false statements about the quality of the Company's work at a meeting of the City Council of Wayne, Michigan in the course of urging the City Council to reject the Company's bid to perform masonry work on a public construction project.

After a bench trial, the trial court, applying a negligence standard, entered judgment for the Company on its defamation claim. Pet. App. 75a.

The Michigan Court of Appeals reversed the trial court's judgment, holding that, under the First Amendment's Petition Clause, King's statements to the City Council were protected against the Company's defamation claim by the "actual malice" standard established in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Pet. App. 54a-55a.

The Michigan Supreme Court, in a 5-2 decision, reversed the Court of Appeals' decision, holding that the *New York Times* "actual malice" standard does not apply to the defamation claim in this case and reinstated the judgment in favor of the Company. Pet. App. 9a.

The Michigan Supreme Court majority read *McDonald v. Smith*, 472 U.S. 479 (1985), to stand for the proposition that the private-figure/public-figure dichotomy drawn in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), applies to defamation claims based on statements made in the course of petitioning the government. Pet. App. 9a. And, applying the *Gertz* dichotomy, the majority concluded that the *New York Times* standard does not apply to the Company's defamation

claim here on the ground that the Company is not a "public figure." *Id.*

Justice Young, the author of the majority opinion, concurred separately to express his "hope that the United States Supreme Court may choose an alternative course to the one suggested by *McDonald*." Pet. App. 12a.

Two Michigan Supreme Court Justices dissented on the ground that *McDonald*, properly read, *requires* application of the *New York Times* "actual malice" standard to all defamation claims against petitioning activity. Pet. App. 32a-33a.

2. The circumstances that generated this case are the following:

Respondent J & J Construction Company is a non-union masonry contractor doing business within the jurisdiction of Bricklayers Local 1. Pet. App. 2a. In 1995, the Company submitted the lowest bid to perform masonry work on a public construction project being undertaken by the City of Wayne, Michigan. *Id.* at 1a.

Local 1 business agent King addressed a public meeting of the Wayne City Council urging the Council to reject the Company's bid. Pet. App. 38a. In advocating his position to the City Council, King made three points. First, King showed the Council pictures he had taken of the Company's masonry work on another public project and explained why he considered that work to be substandard. *Id.* Second, King stated his belief that the Company would have trouble completing the project in a timely fashion. *Id.* Third, King stated that the Company did not compensate its employees at the prevailing rates required by the law governing public contracts in Michigan. *Id.*

After King spoke, the privately employed project manager overseeing the City's construction project addressed the City Council to defend the quality of the Company's masonry

work. *J & J Construction v. Bricklayers Local 1*, Mich. Sup. Ct. No. 119357, Appellants App. pp. 46a-47a.

Having heard from King and the project manager, the Wayne City Council voted to refer the bids for masonry work to the project manager for further review. *J & J Construction v. Bricklayers Local 1*, Mich. Sup. Ct. No. 119357, Appellants App. p. 22a.

Two weeks later, the project manager submitted a report to the City Council addressing the allegations that the Company had performed poor work on another project and did not pay its employees the prevailing wage. With respect to the first allegation, the project manager reported that "[a]fter a thorough review of J & J Construction's past jobs that were specifically mentioned at the May 31, 1995 Council Meeting, we have found that in every case the quality was good." *J & J Construction v. Bricklayers Local 1*, Mich. Sup. Ct. No. 119357, Appellees App. p. 1b. With respect to the prevailing wage allegation, the report referred the City Council to an attached memorandum from the Company, which "stat[ed] how they would substantiate information for a State of Michigan prevailing wage audit." *Id.* In this regard, the report added that "if the masonry union formally requested an audit of J & J Construction certified payroll, the City would have to provide the manpower and assume the cost for such an audit." *Id.* The report concluded by suggesting that, "[i]f the City of Wayne does not want to incur this [audit] cost, then they have the option to go to the next qualified bidder." *Id.*

Five days after receiving the project manager's report, the City Council voted to award the contract to the next lowest bidder and not to the J & J Construction Company. *J & J Construction v. Bricklayers Local 1*, Mich. Sup. Ct. No. 119357, Appellants App. p. 26a. The minutes of the City Council meeting explain this action by noting that "the Council had concerns as to the low bidder because of claims

made about faulty workmanship and because of concerns about noncompliance with the payment of prevailing wages and fringe benefits." *Id.*

3. On the heels of the Wayne City Council decision, the Respondent Company brought this defamation suit in the Wayne County Circuit Court against Petitioners King and Bricklayers Local 1.[1]

After a bench trial, the trial court held that "the statements made about the poor quality of the work to the Wayne City Council were in fact comments that were defamatory and did in fact cost J & J Construction the Wayne Aquatic Center job." Pet. App. 68a. In so holding, the trial court applied a negligence standard on the ground that "there is no qualified

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[1] While not of the moment at this juncture, we note that the Company's complaint also included a claim for tortious interference with business expectancy based on King's statements to the Wayne City Council. The trial court treated the Company's tortious interference claim as derivative of its defamation claim. Thus, the trial court found for the Company on the tortious interference claim on the ground that "an act of slander or defamation can in fact amount to an improper interference." Pet. App. 70a. And, the trial court did not award any damages for this claim beyond those awarded on the defamation claim.

The Michigan Court of Appeals, in reviewing the trial court's judgment, held that the tortious interference with business expectancy claim was completely barred by this Court's decisions in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). Pet. App. 44a-45a.

The Michigan Supreme Court, in its turn, did not reach the question of whether the tortious interference with business expectancy claim was barred by the *Noerr/Pennington* doctrine and thus left the Court of Appeals' decision in this regard undisturbed. Pet. App. 10a. Moreover, without regard to the question of *Noerr/Pennington* immunity, the trial court's judgment on the tortious interference claim would fall automatically if, as we claim here and as the Michigan Court of Appeals held, its underlying defamation determination is legally erroneous.

privilege in this particular case in light of the fact that . . . J & J Construction was a private figure, and was not a public official." *Id.* at 65a. At the same time, the trial court found that the Respondent had *not* proven that King's statements regarding its failure to compensate its employees at the required prevailing wages rates were false. *Id.* at 63a.

On this basis, the court awarded the Company defamation damages in the amount of lost profits on the Wayne project. Pet. App. 70a. In addition to awarding the Company its lost profits on the Wayne contract, the court exercised its discretion under the Michigan defamation statute to award the Company its attorneys fees in bringing the defamation claim. *Id.* at 72a. Finally, the court found that the Company's general business reputation had not been harmed by King's statements to the City Council and did not make any award for that alleged injury. *Id.*

4. In reviewing the trial court's judgment on the defamation claim, the Michigan Court of Appeals began by noting that, generally, "[o]rdinary negligence is sufficient in proving a case of defamation of a private figure in Michigan." Pet. App. 53a. Against that background, that court found that "[t]he question is whether that standard changes if the alleged defamation takes the form of petitioning a governmental entity." *Id.*

The Court of Appeals decided this issue by analyzing this Court's decision in *McDonald v. Smith*, 472 U.S. 479 (1985). Pet. App. 53a-54a. That court read *McDonald* to require the application of the *New York Times v. Sullivan* "standard of known falsehood or reckless disregard of the truth." *Id.* at 54a. That being so, the court concluded that "the trial court erred in confining its inquiry to ordinary negligence" and "remand[ed] the case to the trial court for reevaluation of the evidence under that standard." *Id.* at 55a.

5. On appeal, the Michigan Supreme Court "reverse[d] the judgment of the Court of Appeals that the 'actual malice' qualified immunity standard of *New York Times* applies in *Petition Clause* defamation cases regardless whether the plaintiff is a private or public figure" and reinstated the trial court's defamation judgment in favor of the Company. Pet. App. 9a (emphasis in original).

Like the Michigan Court of Appeals, the Michigan Supreme Court treated the question of the proper defamation standard as one governed by *McDonald v. Smith*. But the Supreme Court majority read *McDonald* as standing for the proposition that "the right to petition should be accorded no greater protection than the rights to free speech and free press." Pet. App. 9a. It followed, according to the majority, that "the private-figure and public-figure dichotomy that applies to defamation claims involving the *Free Speech Clause and the Free Press Clause* also applies to defamation claims involving the Petition Clause" and that "private-figure defamation plaintiffs are only constitutionally required to prove ordinary negligence in order to establish defamation in cases involving the right to petition." *Id.* at 9a & 11a (citation omitted, emphasis in original). In other words, the majority read *McDonald* as standing for the proposition that "[n]o qualified immunity is constitutionally provided to defamation defendants whose statements about private figures are made while petitioning the government." *Id.* at 11a.

Justices Cavanagh and Kelly dissented on the ground that "to interpret *McDonald* as incorporating the public-figure and private-figure dichotomy is a misreading of the case" and the decision is better understood "as employing the actual-malice standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)." Pet. App. 33a.

REASONS FOR GRANTING THE PETITION

As a matter of the most basic First Amendment principles, statements addressed to government representatives critical of a third party's performance of a public function or fitness to perform a public function are entitled to the protection of the "actual malice" standard of *New Times Co. v. Sullivan*, 376 U.S. 254 (1964), against defamation claims brought by the third party.

The salient point, as trenchantly stated by Judge Easterbrook in his Seventh Circuit opinion upholding a jury instruction that "only evidence satisfying the *New York Times* [actual malice] standard would permit an award of damages" on such a defamation claim, is this:

> "The first amendment prohibits efforts to ensure 'laboratory conditions' in politics; speech rather than damages is the right response to distorted presentations and overblown rhetoric. A campaign to influence [government representatives] is classic political speech; it is direct involvement in governance, and only the most extraordinary showing would permit an award of damages on its account." *Stevens v. Tillman*, 855 F.2d 394, 403 (7th Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989).

As the Michigan Supreme Court's decision in this case shows, nonetheless the lower court law in this regard—which as a matter of constitutional principle should be uniform—is in conflict. While the Seventh Circuit and the highest courts of Maryland and Washington do accord petitioning statements the full protection of the *New York Times* "actual malice" standard, the Michigan Supreme Court and the Eighth Circuit do *not* accord petitioning statements such protection.

As the decision below also shows, the conflict and confusion in the lower courts cannot be traced to any disagreement over basic First Amendment principles. Rather,

the division among the lower courts rests on their disagreement concerning the proper reading of this Court's decision in *McDonald v. Smith*, 472 U.S. 479 (1985)—a decision that does *not* directly address the applicability of the *New York Times* "actual malice" standard to petitioning speech and, at most, "throw[s] a cross-light," *United States v. Aluminum Co.*, 148 F.2d 416, 429 (2d Cir. 1945) (L. Hand, J.), on that issue.

As a practical matter, the decision below—and the like decision of the Eighth Circuit—poses a threat to the proper workings of our "representative democracy," which, "to a very large extent, . . . depends upon the ability of the people to make their wishes known to their representatives." *Eastern RR Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961).

"In recent years, there has been a rising concern about the use of civil litigation, primarily defamation suits, to intimidate or silence those who speak out at public meetings . . . . Termed SLAPP suits—strategic lawsuits against public participation—such actions . . . are filed . . . to burden opponents with legal defense costs and the threat of liability and to discourage those who might wish to speak out in the future." *600 West 115th Street Corp. v. Von Gutfeld*, 80 N.Y.2d 130, 603 N.E.2d 930, 933 n.1 (1992). *See* A. Lowe, *The Price of Speaking Out*, 82 A.B.A. J. 48 (1996). Based on data indicating that "Americans by the thousands are being sued, simply for exercising . . . the right to communicate [their] views to [their] government officials . . . on public issues," a University of Denver Political Litigation Project study concluded that the accelerating growth in the number of SLAPP lawsuits poses "a major threat to involved citizens." G. Pring & P. Canan, *SLAPPs; Getting Sued for Speaking Out* 1 & 3 (1996).

Decisions like the Michigan Supreme Court's decision here denying *New York Times* "actual malice" protection to

petitioning speech magnify that threat. For the *New York Times* "actual malice" standard serves to counter the chilling effect of such retaliatory litigation by reducing the risk of defamation liability and by facilitating the speedy disposition of defamation claims that do not meet that standard. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-256 (1986).

As we noted at the outset, Michigan Supreme Court Justice Young authored both the opinion denying *New York Times* "actual malice" protection to the petitioning speech here on the basis of that court's reading of *McDonald v. Smith* and a separate concurring opinion expressing his "hope" that this Court would clarify the law by "choos[ing] an alternative course to the one suggested by *McDonald*." Pet. App. 12a.

Justice Young's entreaty could not be more to the point. The time has come for the Court to resolve the conflict in the state courts and federal circuits created by the conflicting readings of this Court's *McDonald v. Smith* decision and to settle the important issue of the proper level of First Amendment protection against defamation claims for statements made in the course of petitioning the government.

1. By its decision in the instant case, the Michigan Supreme Court majority aligned itself with the Eighth Circuit *en banc* majority in *In re IBP Confidential Business Documents Litigation*, 797 F.2d 632 (8th Cir.)(*en banc*), *reh'g denied*, 800 F.2d 787 (8th Cir. 1986), *cert. denied*, 479 U.S. 1088 (1987).

In re IBP involved a defamation claim by one Hughes Bagley—a former employee of Iowa Beef Processors, Inc. ("IBP")—based on the defendant IBP's letter to a Congressman stating that Bagley had lied in testifying before a House of Representatives subcommittee about IBP's pricing practices and that Bagley had stolen certain IBP documents

subpoenaed by the subcommittee in connection with his testimony. 797 F.2d at 638.

The *en banc* Eighth Circuit majority recognized that IBP's "activities with respect to the . . . letter are classic examples of petitioning activity entitled to some degree of first amendment protection." 797 F.2d at 640. And, in "identify[ing] the degree of protection to be accorded IBP's activities," the Eighth Circuit concluded that what "[f]low[s] from the Supreme Court's discussion in *McDonald*," *id.* at 642, is that where the defamation plaintiff "is a public official or a public figure, the *New York Times* actual malice standard will be applicable," but where the plaintiff "is found to be a private figure, the less formidable *Gertz* [negligence] standard . . . will be applicable," *id.* at 644 citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Finding that the *IBP* plaintiff was a private figure, the Eighth Circuit held that the defendant IBP was not protected by the *New York Times* "actual malice" standard. *Id.* at 647.

Judge Arnold, joined by Judges Bright, McMillian and Magill, dissented from the *IBP* majority's ruling and from the majority's reading of *McDonald*. As Judge Arnold read it, "*McDonald v. Smith*, 472 U.S. 479 (1985), establishes that *whenever* the right to petition is exercised, that right is afforded the protection of the actual malice standard; the nature of the communication and not the *status* of the defamation plaintiff is the touchstone." 800 F.2d at 789 (internal quotation marks omitted; emphasis in original).

2. In *Stevens v. Tillman*, 855 F.2d 394 (7th Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989), the Seventh Circuit aligned itself *with* Judge Arnold's reading of *McDonald v. Smith*—and his conclusion that petitioning speech is protected by the *New York Times* "actual malice" standard—and *against* the position of the Eighth Circuit *IBP* majority and the Michigan Supreme Court majority here. The Seventh

Circuit position accords with that of the Maryland Court of Appeals and the Washington Supreme Court. *See Miner v. Novotny*, 304 Md. 164, 498 A.2d 269 (1985); *Richmond v. Thompson*, 130 Wn.2d 368, 922 P.2d 1343 (1996).

Stevens v. Tillman involved defamation claims based in part on statements critical of a public school principal made at meetings of a board of education. The district court in that case "instruct[ed] the jury that only evidence satisfying the *New York Times* standard would permit an award of damages" and "did so on two grounds: that [the plaintiff] Stevens is a public official, and that the speakers were exercising their right to petition the government for redress of grievances." 855 F.2d at 403. The Seventh Circuit affirmed the district court's jury instruction on *both* grounds. *Id.*

On the second of these grounds—"that the speakers were exercising their right to petition the government"—the Seventh Circuit concluded that "[t]he statements made directly to the Board are governed by the *New York Times* standard under the holding of *McDonald v. Smith*, 472 U.S. 479 (1985)." 855 F.2d at 403. As the Seventh Circuit observed, an effort to "influence [the government] is classic political speech," and "[t]he first amendment prohibits efforts to ensure 'laboratory conditions' in politics." *Id.*[2]

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[2] *Eaton v. Newport Board of Education*, 975 F.2d 292 (6th Cir. 1992), and *Webster v. Sun Oil Co, Inc.*, 790 F.2d 157 (D.C. Cir. 1986), make the same point. In *Eaton*, the Sixth Circuit, in dismissing a former public school principal's claim for "the tort of outrageous conduct" arising out of the campaign that led to her termination, invoked the following passage from the Seventh Circuit's *Stevens* opinion: "statements made directly to the Board [of Education] are governed by the *New York Times* standard under the holding of *McDonald v. Smith*, 472 U.S. 479 (1985)." 975 F.2d at 299, quoting *Stevens v. Tillman*, 855 F.2d at 403. Likewise, in *Webster*, the District of Columbia Circuit read *McDonald* as holding "that the right to petition [i]s sufficiently protected by . . . a rule akin to the one imposed by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)." 790 F.2d at

3. The highest courts of two states have read *McDonald v. Smith*—as did the Seventh Circuit, the *IBP* dissenters and Michigan Supreme Court dissenters here—to *require* the application of the *New York Times* "actual malice" standard to *all* defamation claims arising out of petitioning activity.

In *Miner v. Novotny*, 304 Md. 164, 498 A.2d 269 (1985)—a defamation action over a statement in a formal complaint of police brutality made to the county sheriff's office—the Maryland Court of Appeals held:

> "In light of *McDonald*, the qualified privilege recognized in *New York Times* and its progeny constitutes the extent of the constitutionally-mandated protection of the First Amendment right to petition the government for redress of grievances." 498 A.2d at 272.

And, the Maryland court made clear that the *New York Times* "actual malice" standard applied as a "constitutionally-based privilege provided by the Petition Clause." *Id.* at 275. Indeed, the court did not even consider whether the plaintiff—a deputy sheriff—qualified as a "public official" under *Rosenblatt v. Baer*, 383 U.S. 75 (1966).

In *Richmond v. Thompson*, 130 Wn.2d 368, 922 P.2d 1343 (1996)—which arose in the same context as *Miner*—the Washington Supreme Court, citing *Miner*, agreed that "the proper standard under the petition clause must be the *New York Times* qualified privilege." 922 P.2d at 1349. The Washington court rested its application of the *New York Times* "actual malice" standard on *both* the status of the

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161. *See also Cardtoons, L.C. v. Major League Baseball Players Assoc.*, 208 F.3d 885, 901 & n. 14 (10th Cir. 2000)(*en banc*)(Lucero, Brorby & Briscoe, JJ., dissenting)("*McDonald* makes it clear that state libel actions arising from petitioning activity cannot proceed unless the elements of libel are consistent with the constitutionally-mandated actual malice standard.").

plaintiff as a "public official" *and* the petitioning nature of the speech at issue. *Id.* at 1348-1349.[3]

4. The Michigan Supreme Court majority took this Court's refusal in *McDonald v. Smith* to "elevate the Petition Clause to special First Amendment status," 472 U.S. at 485, to indicate "that the private-figure and public-figure dichotomy that applies to defamation claims involving the *Free Speech Clause and the Free Press Clause*, *Gertz*, [418 U.S.] at 342-347, also applies to defamation claims involving the Petition Clause," Pet. App. 9a (emphasis in original). This is a serious misreading of the *McDonald* opinion.

(a) In the first place, the Michigan Supreme Court majority's reading of *McDonald v. Smith* takes the case entirely out of its legal context.

McDonald reached this Court because of the following conflict among the lower courts over the protection against defamation claims granted by the Petition Clause:

> • Some courts had held that the Petition Clause provides *absolute* immunity against defamation claims based on statements made in petitioning the government. *See Sherrard v. Hull*, 53 Md. App. 553, 456 A.2d 59, 67, *aff'd per curiam*, 296 Md. 189, 460 A.2d 601 (1983)

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[3] In *Harris v. Adkins*, 189 W.Va. 465, 432 S.E.2d 549, 550 (1993), the West Virginia Supreme Court of Appeals considered the extent to which the Petition Clause in the West Virginia Constitution—which "afford[s] protection similar to that provided by the First Amendment to the United States Constitution"—shields from defamation liability statements about a city councilman made at a city council meeting. Stating its "agree[ment] with the reasoning in *McDonald*," the West Virginia high court concluded that "the right to petition the government found in Section 16 of Article III of the West Virginia Constitution[, which] is comparable to that found in the First Amendment to the United States Constitution[,] . . . does not provide an absolute privilege for intentional and reckless falsehoods, but the right is protected by the actual malice standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)." 432 S.E.2d at 552.

("while there is some authority for the proposition that the privilege should be qualified by a malice standard, . . . better reasoned cases hold the privilege to be absolute"); *Webb v. Fury*, 167 W.Va. 434, 282 S.E.2d 28, 34 (1981) ("even proof of malicious intent or knowing falsity would not defeat the First Amendment right to petition").

- Other courts had held that the Petition Clause provides only qualified immunity of the sort defined by the *New York Times* "actual malice" standard. *See McDonald v. Smith*, 562 F.Supp. 829, 841-842 (M.D.N.C. 1983), *aff'd*, 737 F.2d 427, 428-429 (4th Cir. 1984) ("right to petition" requires application of the *New York Times* "actual malice" standard); *Bradley v. Computer Sciences Corp.*, 643 F.2d 1029, 1033 (4th Cir.), *cert. denied*, 454 U.S. 940 (1981)("letter is not scurrilous, anonymous, or full of unfounded charges"); *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1345 (7th Cir.), *cert. denied*, 434 U.S. 975 (1977) ("a state's interest in protecting its citizens from common law torts justifies overriding these First Amendment considerations when knowing falsity is alleged").

In contrast—and of the most critical significance—*no* court had held that the Petition Clause provides anything *less* than *New York Times* immunity. *See Sherrard*, 456 A.2d at 68-69 (reviewing the "split of authority" over "whether the petitioning privilege should be absolute or qualified").

In this Court, the *McDonald* defendant argued for absolute immunity under the Petition Clause and against the Fourth Circuit's ruling that under the Petition Clause "damages may be recovered only if petitioner is shown to have acted with malice," i.e., "'malice' . . . defined . . . in terms . . . consistent with *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)." 472 U.S. at 485. The *McDonald* Court responded by rejecting that challenge to the Fourth Circuit's position and by ruling "that the Petition Clause does not require the . . .

expan[sion of] th[e *New York Times*] privilege into an absolute one." *Id.* This Court did not, however, go further and adopt the view—embraced by *no* court at that time—that the Petition Clause provides something less than the qualified immunity defined in *New York Times*.

Indeed, the *McDonald* Court described *White v. Nicholls*, 44 U.S. (3 How.) 266 (1845), and *Garrison v. Louisiana*, 379 U.S. 64 (1964)—the two cases on which the Court relied in holding that the Petition Clause does not provide absolute immunity—as applying standards similar to the *New York Times* standard.[4] Thus, as the Michigan Supreme Court dissenters point out, the *McDonald* Court proceeded on the assumption that the choice before it was between, on the one hand, "absolute immunity," and, on the other hand, qualified immunity as provided by "the actual-malice standard." Pet. App. 32a-33a.

In the end, the *McDonald* Court emphasized that under its ruling, "[t]he right to petition *is* guaranteed," while "the right to commit libel *with impunity* is not." 472 U.S. at 485 (emphasis added). Underscoring this point, Justice Brennan's concurring opinion added "that expression falling within the scope of the Petition Clause, while fully protected by the actual-malice standard set forth in *New York Times Co. v. Sullivan*, is not shielded by an absolute privilege." *Id.* at 490.

(b) Equally to the point, the Michigan Supreme Court's reading of *McDonald v. Smith* puts that decision at cross-purposes with this Court's Petition Clause jurisprudence.

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[4] The *McDonald* Court described *White* as holding that "petitions to the Government" are "actionable if prompted by 'express malice,' which was defined as 'falsehood and the absence of probable cause.'" 472 U.S. at 484, quoting *White*, 44 U.S. at 291. And, the *McDonald* Court described *Garrison* as holding that "petitions to the President that contain intentional and reckless falsehoods 'do not enjoy constitutional protection.'" 472 U.S. at 484, quoting *Garrison*, 379 U.S. at 75.

The Court has repeatedly "recognized [that the] right to petition [i]s one of 'the most precious of the liberties safeguarded by the Bill of Rights,' *Mine Workers v. Illinois Bar Assn*, 389 U.S. 217, 222 (1967), and ha[s] explained that the right is implied by '[t]he very idea of a government, republican in form,' *United States v. Cruikshank*, 92 U.S. 542, 552 (1876)." *BE&K Construction Co. v. NLRB*, 536 U.S. 516, 524-525 (2002).

Given the central role of petitioning in our representative form of government, the Court has taken care to accord the right to petition a wide measure of "'breathing space' protection." *BE&K Construction*, 536 U.S. at 531, citing *New York Times*, 376 U.S. at 279. The Court has, for example, provided broad Petition Clause immunity from anti-trust claims in a line of seven decisions running from *Eastern RR Presidents Conference v. Noerr Motor Freight, supra*, to *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993). As Judge Easterbrook recognized in *Stevens v. Tillman*, the lesson is that speech to "influence the [government] is classic political speech," and "in politics[,] speech rather than damages is the right response to distorted presentations and overblown rhetoric." 855 F.2d at 403.

Against that background, "[i]n the balance to be struck between the State's interest in protecting its citizens from reputational injury and the Constitution's requirement that the State not unduly burden its citizens seeking to participate in the fundamental processes of governance, the scale is not even." *600 West 115th Street Corp. v. Von Gutfeld*, 80 N.Y.2d 130, 603 N.E.2d 930, 934 (1992). To the contrary, the balance is inclined toward those who participate in that process by addressing government representatives.

Because "[t]he public has an interest in ensuring that only competent, reliable and responsible contractors receive public work," for example, "it is the right of every citizen to

communicate with his or her government and its officers on matters that affect the discharge of their duties in this regard." *A & B Abell Elevator Co. v. Columbus/Central Ohio Building & Construction Trades Council*, 73 Ohio St. 3d 1, 651 N.E. 2d 1283, 1291 (1995). That being so, it follows, in Judge Arnold's words, that "*whenever* the right to petition is exercised, that right is afforded the protection of the actual malice standard; the nature of the communication [as petitioning speech] and not the *status* of the defamation plaintiff is the touchstone." *In re IBP*, 800 F.2d at 789 (internal quotation marks omitted; emphasis in original).

It follows, too, that the *Gertz* negligence standard is inappropriate in the petitioning context. As Justice Powell has explained, *Gertz* accords a lower level of immunity to statements broadcast to the general public about private figures "[l]argely because private persons have not voluntarily exposed themselves to increased risk of injury from defamatory statements and because they generally lack effective opportunities for rebutting such statements." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 756 (1985) (opinion of Powell, J.).

Neither of those points holds with respect to petitioning speech addressed to government representatives critical of a person who performs a public function or who seeks to perform a public function.

In the first place, while private persons have not invited the general public's attention to their actions or capacities, a person who, for example, "seek[s] the fruits of a taxpayer-funded construction project," Pet. App. 28a n. 11, "invites public attention to the quality and efficiency of his or her work," *Kahn v. Bower*, 232 Cal. App. 3d 1599, 1614, 284 Cal. Rptr. 244, 254 (1991), and invites statements concerning these matters to the appropriate government representatives.

Moreover, while a private person has no means of responding to statements broadcast to the general public, that is not true of petitioning speech addressed to government representatives. Where, as here, the government representatives are holding a public hearing, "[t]he [allegedly] defamed, in the same setting and with the same audience, has the immediate opportunity to air his competing view." *600 West 115th Street Corp. v. Von Gutfeld*, 603 N.E.2d at 934. And, as Justice Young noted in his concurring opinion below, "the Petition Clause itself protect[s] [the allegedly defamed] plaintiff's right to deliver a written petition to the [government] in order to answer the defamatory statements made by the defendant." Pet. App. 29a. Moreover, where the petition takes the form of a charge or complaint, "'the protective machinery of due process'"—required in many situations where the government takes adverse action against a party—provides an "effective means of rebutting the lie, correcting the error, and minimizing the adverse impact on [the plaintiff's] reputation." *Kahn v. Bower*, 232 Cal. App. 3d at 1614, 284 Cal. Rptr. at 253, quoting *Stern v. United States Gypsum*, 547 F.2d at 1344.

* * *

McDonald v. Smith is the only decision in which this Court has addressed the nature and extent of the Petition Clause protection against defamation claims. The opinions below and the conflict in the state and federal appellate courts show that "the scope of *McDonald* is open to considerable doubt." *Baker v. Charles*, 919 F.Supp. 41, 43 (D. Me. 1996). And, on the Michigan Supreme Court's reading of *McDonald*, "the extent of First Amendment . . . protection for a private citizen who petitions a state administrative agency on a subject within its jurisdiction" is "[s]urprisingly" narrow. *Baker v. Charles*, 919 F.Supp. at 42.

This kind of "[u]ncertainty as to the scope of the constitutional protection can only dissuade protected speech,"

Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 685 (1989), and encourage retaliatory "SLAPP" lawsuits.

The Court should resolve the uncertainty created by the division among the lower courts over the extent of First Amendment protection against defamation claims brought in retaliation for statements made by citizens to their governments.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MARY ELLEN GUREWITZ
1000 Farmer Street
Detroit, MI 48226

JAMES B. COPPESS
815 Sixteenth Street, NW
Washington, DC 20006

LAURENCE GOLD *
805 Fifteenth Street, NW
Washington, DC 20005
(202) 842-2600

* Counsel of Record